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In the Supreme Court of the United States

S. MULLEN ET AL.,
Plaintiff in Error,

vs. No. 25

MALINDA PICKENS, ET AL.,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR

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AUTHORITIES CITED

Bledsoe vs. Wortham, 35 Okla., 261

Lynch vs. Franklin, 130 Pac., 599.

Mann vs. Wilson, 23 Howard 457.

Crews vs. Burcham, 1 Black 352.

Jones vs. Meehan, 175 U. S. 1.

Mullen vs. Jansen, 224 U. S., 448.

Foxcroft vs. Melette, 45 U. S. (4 Howard 376).

STATUTES CITED

Sec. 22 Supplemental Agreement
32 Stat at L 641.

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In the Supreme Court of the United States

J. S. MULLEN ET AL,
Plaintiff in Error,

VS. No. 145

MALINDA PICKENS, ET AL,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR

STATEMENT OF CASE

The Defendants in Error (plaintiffs below) filed their suit in the District Court of Grady County, Oklahoma, against the plaintiffs in error(defendants below), wherein they alleged that they were the owners in fee simple of the title to certain lands allotted to Eliza Bell, a Choctaw Indian, and in said petition alleged that Eliza Bell died February 12, 1905, leaving as her sole heirs Malinda Pickens and Frances Bell, who are the defendants in error here. They further alleged that on the 9th day of September, 1910, the plaintiffs in error unlawfully entered into the possession of said lands; that these plaintiffs in error placed of record in the office of the Register

of Deeds of Grady County, Oklahoma, on the 30th day of October, 1912, a warranty deed from Malinda Pickens to J. S. Mullen, L. V. Mullen and W. M. Bonner, which said deed purports to have been executed on the 23rd day of September, 1905, and that these plaintiffs in error also recorded an affidavit of F. M. Adams, which affidavit purports to construe the deed dated September 23, 1905. It was then alleged by the defendants in error in their said petition that the deed of date, Sept. 23, 1905, was void and of no effect and conveyed no title to the said J. S. Mullen, L. V. Mullen and W. M. Bonner, and that the two documents of record constituted a cloud upon the title of defedants in error. The prayer of said petition was for the possession of the lands, for damages and that the instruments of record be cancelled as clouds upon their title. (See transcript pages 13 to 15, inclusive.)

The plaintiffs in error (defendants below) filed their answer as shown on pages 18 and 19, inclusive, and thereafter filed an amended supplemental answer and cross-petition, which will be found commencing on page 21 of the case-made and ending on page 22 thereof; and in their answer first filed and their supplemental answer and cross-petition it was alleged as a defense that the lands sued for were allotted to Eliza Bell, deceased, in lieu of certain other lands, which lands were selected by F. A. Bonner as administrator of the estate of Eliza Bell, and which said lands were conveyed by warranty deed to the plaintiffs in error, J. S. Mullen, L. V. Mullen

and W. M. Bonner, and in said deed to the lands so selected there was this provision:

> "If for any reason the allotment of Eliza Bell, deceased, as described, be cancelled, set aside or held for naught and afterwards be filed at any point in the Choctaw and Chickasaw Country, then this deed and its warranties and covenants shall apply to said lands so hereafter selected, the same as if it were described in this instrument, and if it be necessary for me to hereafter execute a deed to the lands so selected I hereby covenant and warrant to the said J. S. Mullen, L. V. Mullen and W. M. Bonner, their heirs, legal representatives and assigns, that I shall so execute said deed."

And in the answer first filed it was further alleged that at the time of the execution of said deed of date, September 23, 1905, the said Malinda Pickens was a citizen of the United States and as such was entitled to all the rights and privileges of said citizenship, and that she was at that time an unrestricted Indian and that the lands described in said conveyance were unrestricted lands. It was further allegd in the answer that the lands selected were lost in contest proceedings, and that the lands described in plaintiff's petition were selected in lieu of the lands described in said deed of conveyance of date, September 23, 1905, and that by reason of the covenants of said deed of conveyance of date September 23, 1905, these defendants are entitled to a conveyance from said Malinda Pickens conveying to them the lands describ-

ed in plaintiffs said petition. It was further alleged in the answer that Frances Bell and Malinda Pickens, defendants in error here, executed a deed to one R. H. Mitchell, which deed was approved by the County Judge of Pittsburg County, Oklahoma, on the 20th day of October, 1912, the order approving same being filed of record in the office of the Register of Deeds of Grady County, Oklahoma, on November 7, 1912, and recorded in book 104, at page 114; and that by reason of which Malinda Pickens and Frances Bell were not the owners of the lands and that R. H. Mitchell was a necessary party to the suit. There was a demurrer filed to the answer and supplemental answer and cross-petition of plaintiffs in error (defendants below); which demurrer was sustained, and on the 18th day of October, 1913, judgment was entered in favor of the defendants in error and against these plaintiffs in error, which said judgment will be found on page 26 of the case-made.

Motion for a new trial was filed and overuled and exceptions saved, and the case-made was duly filed in this court after same had been settled and signed.

In the petition in error it is alleged as error:

First: That the court erred in sustaining a demurrer to the answer and cross-petition of the plaintiffs in error, which was excepted to at the time;

Second: That the judgment of the trial court was contrary to the law;

Third: That the court erred in rendering judgment against these plaintiffs in error for the reason that the answer filed by them shows that the said Frances Bell and Malinda Pickens had sold the land sued for by them to one R. H. Mitchell, which is shown in paragraph 5 of their said answer and cross-petition (Transcript pages 18 and 21.)

Fourth: That the court erred in rendering judgment against these plaintiffs in error without any testimony being offered to support the allegations of the petition of the defendants in error, which was excepted to by the plaintiffs in error at the time.

The Supreme Court of the State of Oklahoma, upon hearing said petition in error affirmed the decision of the District Court of Grady County, Oklahoma, for opinion of court see pages..... to ..... inclusive, transcript of record herein. Thereupon the plaintiffs filed their petition for writ of error, as shown on pages 3 to 6, inclusive of transcript, and their assignment of errors as shown on pages 6 and 7 of the transcript, and thereafter writ of error was duly allowed as shown on page 9 of the transcript, and this case is now before this Court.

SPECIFICATION OF ERRORS

Plaintiffs in error assign as error in the Supreme Court of Oklahoma in its final judgment and decree, the following:

First: "The Supreme Court of the State of Oklahoma erred in its construction of section 22 of the Act of Congress of 1902, ratified by treaty September 25th, 1902 (35 Stat a L.....) wherein said Supreme Court of the State of Oklahoma held that the deed executed by the defendants in error herein was insufficient to convey the lands selected in lieu of the lands described in said conveyance, for that under said deed so executed and by reason of said Section 22 of the Act of Congress ratified September 25, 1902, the lands so selected in allotment were inalienable and the heirs who inherited the said lands, and being the defendants in error herein, were unrestricted in their right of alienation of said lands, and under said conveyance so executed by said heirs, they, the said defendants in error being citizens of the United States, without restraint as to this character of land, they, the said defendants in error, Malinda Pickens and Frances Bell, had a lawful right to convey any land that might be selected in lieu of the lands described in said conveyance." (Transcript pages 6 and 7.)

We do not intend to urge the other assignments of error.

BRIEF AND ARGUMENT

We beg to call the Court's attention to the answer of the plaintiffs in error as filed in the trial Court, as shown on pages 18 and 19 of the transcript. Now the facts involving this are about as follows: F. A. Bonner,

administrator of the estate of Frances Bell, deceased, made a selection of lands in Section 31, Township 2 South, Range 1 East, and in Section 6, Township 3 South, Range 7 East, and after selection Malinda Pickens executed a warranty deed to the lands thus selected to the platintiffs in error, J. S. Mullen, L. V. Mullen and W. M. Bonner. This deed had the following covenants in it:

> "That I further warrant and covenant with the said J. S. Mullen, L. V. Mullen and W. M. Bonner that if for any reason the allotment of said Eliza Bell, deceased, as described, be cancelled, set aside and held for naught, and afterwards be filed at any point in the Choctaw or Chickasaw country, that this deed and its warranties and covenants shall apply to said lands so hereafter selected the same as if it were described in this instrument, and if it be necessary for me to hereafter execute a deed to the land so selected I hereby covenant and warrant to the said J. S. Mullen, L. V. Mullen and W. M. Bonner, their heirs, legal representatives and assigns, that I will so execute said deed." (See transcript commencing at bottom of page 6.

Now it is further shown that the lands first selected were lost in contest and that the lands involved in this suit were selected in lieu of the lands first selected, and it is our contention that the above quoted covenants entitle the plaintiffs in error here to a conveyance to the lands selected in lieu of the lands first selected. It is the contention of the defendants in error that this contract or agreement for a deed having been made prior to a se-

lection of the lands in controversy that the same is in contravention of the Federal statutes and void.

We realize the fact that this court has passed upon the question where an Indian made a deed before selection, and held the same void, the two cases holding this being that of I. P. Bledsoe vs. Wortham et al, 35 Okla., page 261, and Lynch vs. Franklin, 130 Pac. 599 36 Okla., page ....., which latter case has been affirmed by the Supreme Court of the United States, but we feel and believe that there should be a distinction made between the case at bar and the two cases cited, *supra*, in this, that under Section 22 of the Supplemental Treaty between the Chickasaws and Choctaws (32 St. at Large, 641), where an Indian died before selection his heirs took the lands as a grant direct from the Government, and by reason of which the heirs could convey the land to be selected, and when selected, by the doctrine of relation, the lands thereafter selected would inure to the benefit of the grantee. Just as Justice Williams said in the Bledsoe-Wortham, case *supra*:

> "The question of constructive allotment, or where the party had done everything reasonably within his power to select an allotment, by making application, etc., but being wrongfully refused, etc., is not in this case, and as to such probable exception we express no opinion."

In the case of Mann vs. Wilson, 23 Howard, 457 (16

L. Ed, 584), we have a case to which we invite the court's careful attention, as, in our judgment the case is identical with the case at bar. There the Indian conveyed by warranty deed certain sections of land before the same were surveyed, or platted, or selected, but which were afterwards selected and set apart to the Indian; the Indian then died and a controversy arose between the heirs of the Indian and the grantee of the Indian before selection, and the Supreme Court of the United States upheld the first deed. The same doctrine laid down in the Mann-Wilson case, will be found in Crews vs. Burcham, 1 Black, 352 (17 L. Ed., 91); Jones vs, Meehan, 175 U. S., page 1 (44 L. Ed., page 49); and now in the case of Mullen-Jansen vs. U. S. 224 U. S., 448 (56 L. Ed., 834), the Supreme Court, in our judgment, reafffirmed the same doctrine in a Chickasaw-Choctaw case, wherein it was held that where the Indian died before selection of the lands, the heirs are entitled to same as a grant direct from the government, and direct from the government to such heirs, and that under these conditions the land the heirs are entitle to is in the nature of an estate in expectancy, and the heirs being unrestricted as to this land as so held in the Mullen—Jansen vs. United States case, *supra*,) they could convey the land or make any contract for a conveyance, although no selection had been made, and that when the selection is made, by the doctrine of relation, the title subsequently acquired would inure to the benefit of the grantee. On page 841 of the Law Edition, *supra*, in the case of Mullen-Jansen

vs the United States, the Supreme Court of the United States said:

> "And there was no restriction in cases under paragraph 22 upon alienation of the lands prior to the date of the patent. There was undoubtedly a complete equitable interest which, in the absence of restriction, the owner could convey."

Citing Mann vs. Wilson; Crews vs. Burcham; Jones vs. Meehan, *supra*. So this court will see that the Supreme Court of the United States cites the Mann vs. Wilson case, and the others, in support of the doctrine we are insisting upon here. See also 62 U. S., 228; 85 U. S., 805; 99 U. S., 324; 20 Wallace, 590; 46 Ark., 285; 50 Ark., 141; 14 Minn., 544.

This proceeding was one in equity and, as we have always understood the rule in equity proceedings. the court looks to the intention of the parties. In the case at bar the pleadings disclose that it was the intention of the defendants in error to convey the title to the lands that might be allotted in the name of the deceased allottee, whether it be the particular lands described in the deed or lands to be thereafter selected in lieu thereof. In other words, it was the intention of the defendants in error to convey the landed estate in expectancy of Eliza Bell, deceased. This being their intention a court of equity should enforce the same. In 26 Calf., page 110, it is said:

"The acts of the parties showing their own construction may be considered by the court in construing a deed of doubtful import."

This case is cited with approval in re Stineback vs. Stewart,, 11 Wallace, 576. See also Hamm vs. San Francisco, 17 Federal, 119.

In 35 N. W.., at page 862, syllabus 3 is as follows:

"It is a cardinal rule of construction to ascertain and give effect, if practicable, to the intention of the parties, as gathered from the language of a deed, the situation of the parties and the subject matter. All parts of the instrument are to be construed together and the construction is to be upon the whole if the different parts can stand together. The words of the deed are to be taken as the grantor's and any ambiguity or uncertainty is to be resolved in favor of the grantee, but technical rules of construction are not to be so applied as to defeat the manifest intention of the parties."

See also Driscoll vs. Green, 59 N. H.., and Johnson vs. Simpson, 36 N. H., page 91.

In the 150 Federal, at page 17, it is said:

"The intention of the parties, when manifest or where ascertained from the written agreement, must control and be enforced without regard to inapt expressions or dry words of the contract, unless that intention is directly contrary to the plain sense of the binding words of the agreement."

See also 173 Federal, 855; 145 Fed., 144; 141 Fed., 563; 104 Fed., 457, also page 121; 76 Fed., 118; 58 Fed., 437; 34 L. R. A., 477. In the 173 Fed., 855, it is said:

> "Where the language of an agreement is contradictory, obscure or ambiguous, or where its meaning is doubtful so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary and such as a prudent man would naturally execute, while the other makes it inequitable, unusual, or such as a reasonable man would not likely enter into, the interpretation which makes a rational and probable agreement must be preferred to that which makes it unusual, unfair or an improbable contract."

See also 121 Fed., 609; 19 Fed., 727; 71 Wis., 177; 108 N. Y., 288.

In the case of Prentice vs. Stearn, 113 U. S., 435 (28 L Ed., 1029), syllabus 2 reads as follows:

> "In an action at law to recover possession of land, if the deed under which the plaintiff claims title is not effectual to convey the land by reason of a mistaken description, although equity will relieve the plaintiff by reforming the deed, *yet such relief can only be had in a suit in equity, brought for that purpose.*"

See also Prentice vs. N. P. Ry., Co., 38 L. Ed., 947; 154 U. S., 173.

Now, if the court please, we invite the court's careful attention to these last three cases, for we feel that this court will distinguish the case at bar from the Bledsoe-Wortham case and the Lynch-Franklin case. And from the three cases cited, *supra*, this court can but decree a specific performance of covenants contained in the deed to these plaintiffs in error. In the case of Foxcroft vs. Melette, 45 U. S. (4 Howard, 376), it is said:

> "The deed is if possible, to be made operative in some way and the constructions should be liberal in order to affect an object and enforce the original design."

See also People vs. Starns, 97 N. Y., 366. In the case of the United States vs. Arendo, 31 U. S. (6 Peters, 740), it is said:

> "Deeds are to be read in the light of the circumstances existing at the time of their execution."

See also 2nd Devlin on Deeds, Section 839; 1st Greenleaf on Evidence, Sections 278, 288.

At this time we wish to call the court's attention to the fact that the contract for a deed, embodied in the warranty deed of the defendants in error to the plaintiff's in error, was made at a time when they had a lawful right to make such a contract. We challenge the defendants in error to cite us a single case to the contra-

ry, and we challenge the defendants in error to cite us a statute prohibiting the making of such a contract for a deed; and if there be no statute prohibiting the making of such a contract, why should not the same be enforced the same as the contract of any other citizen of the United States? The plaintiffs in error, when they took their deed, realized the fact that for some reason the lands conveyed to them might be lost in contest proceedings, and by reason of which the provision was made in the deed for the purpose of protecting them in the event of such contingency. Now, if it was the intention of the defendants in error to convey the estate of Eliza Bell, why should not this court decree a performance of the contract?

In the case of Orient Mutual Insurance Company vs. Wright, 68 U. S., (1st Wallace, 456), it is said:

> "Deeds between private persons are to be construed against the grantor and favorable to the grantee, so that of two constructions, one of which will defeat the deed and the other make it effectual, the latter is to be taken as the true construction."

See also Garrison vs. United States, 74 U. S. (7 Wallace 688); Norman vs. Bradley, 76 U. S. (9 Wallace, 394); Carter vs. Mann, 18 Minn., 96; Esty vs. Baker, 79 Am. Dec., 616.

We respectfully submit that this case should be re-

versed and a judgment here entered decreeing a specific performance of the contract embodied in the deed of the defendants in error, as of date, September 23, 1905.

Respectfully submitted,

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